LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 13 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 16

THE UNITED STATES,
Petitioner,
v.
CALTEX (PHILIPPINES), INC., THE SHELL COMPANY OF PHILIPPINE ISLANDS LIMITED and STANDARD-VACUUM OIL COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS

LEO T. KISSAM,
Counsel for Respondent Caltex (Philippines), Inc.,
20 Pine Street,
New York 5, N. Y.

ALBERT R. CONNELLY,
Counsel for Respondents The Shell Company of Philippine Islands Limited and Standard-Vacuum Oil Company,
15 Broad Street,
New York 5, N. Y.

October 13, 1952.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION TO REVIEW	2
APPLICABLE CONSTITUTIONAL PROVISION	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	2
THE FACTS	3
THE DECISION BELOW	8
SUMMARY OF ARGUMENT	10
ARGUMENT	
THE COURT OF CLAIMS CORRECTLY HELD THAT THE UNITED STATES IS OBLIGATED UNDER THE FIFTH AMENDMENT TO PAY JUST COMPENSATION FOR PRIVATE PROPERTY WHICH IT TOOK AND USED FOR MILITARY PURPOSES IN WARTIME AND WHICH IT ULTIMATELY DESTROYED TO DENY ITS USE TO THE ENEMY	12
1. The decision below is in accord with long-settled principles of constitutional law established by judicial decisions under the Fifth Amendment	14
2. The decision below is in accord with non-judicial interpretation of the obligation imposed upon the United States by the Fifth Amendment	36
3. The principles of constitutional law applied by the court below are consistent with established principles of international law	43
4. Petitioner's arguments addressed to the expediency of compliance with its constitutional obligation do not afford any basis for challenging the correctness of the decision below	49
CONCLUSION	58

TABLE OF CASES

PAGE

John R. Baldwin v. *United States*, Rep. No. 259 from Court of Claims to House of Representatives, 36th Cong., 2d Sess. (1860-61) 20, 21

Barrington (U. S.) v. *Mexico*, Commission under the Convention of July 4, 1868, V Moore's Internat. Arb. 3674 45

Beasely v. *United States*, 21 Ct. Cl. 225 (1886) 25

Booth & Company v. *United States*, 62 Ct. Cl. 288 (1926) 27

Bowles v. *Willingham*, 321 U. S. 503 (1944) 35

Brown v. *United States*, 29 Ct. Cl. 394 (1894) 26

Campbell v. *United States*, 8 Ct. Cl. 240 (1872) 38

Conard v. *United States*, 25 Ct. Cl. 433 (1890) 26

Dow v. *Johnson*, 100 U. S. 158 (1879) 20, 35

Falbo v. *United States*, 320 U. S. 549 (1943) 35

Gratt v. *United States*, 1 Ct. Cl. 41 (1863) 10, 19, 21-24, 25, 26, 28, 43, 52

Hamilton v. *Kentucky Distilleries Co.*, 251 U. S. 146 (1919) 35

Hirabayashi v. *United States*, 320 U. S. 81 (1943) ... 35

Hirsh v. *Block*, 267 Fed. 614 (App. D. C. 1920) 20

International Paper Co. v. *United States*, 282 U. S. 399 (1931) 17

Jardel (Fr.) v. *United States*, Commission under the Convention of January 15, 1880, V Moore's Internat. Arb. 3700 45

Juragua Iron Co. v. *United States*, 212 U. S. 297 (1909) 33, 34, 35

Korematsu v. *United States*, 323 U. S. 214 (1944) .. 35

PAGE

Labrot (*Fr.*) v. *United States*, Commission under the Convention of January 15, 1880, V Moore's Internat. Arb. 3706 45
Lawton v. *Steele*, 152 U. S. 133 (1894) 13, 35
Lichter v. *United States*, 334 U. S. 742 (1948) 35
MacDonald (*Gt. Br.*) v. *United States*, Mixed Commission of British-American Claims, May 8, 1871, U. S. For. Rel. 1873, Vol. III 54-55 45
Madison Female Institute v. *United States*, 23 Ct. Cl. 188 (1888) 25-26
Mayor v. *Lord*, 18 Wend. 126 (N. Y. 1837) 33
Meade v. *United States*, 2 Ct. Cl. 224 (1866) 26
Miller v. *Horton*, 26 N. E. 100 (Mass. 1891) 27
Miller v. *Schoene*, 276 U. S. 272 (1928) 13
Ex Parte Milligan, 71 U. S. 2 (1866) 35
Mitchell v. *Harmony*, 54 U. S. 115 (1852) 10, 19-20, 31, 43
Myers v. *United States*, 22 Ct. Cl. 80 (1887) 25, 26
Nelson v. *United States*, 22 Ct. Cl. 159 (1887) 25
North American Storage Co. v. *Chicago*, 211 U. S. 306 (1908) 13
Omnia Commercial Company v. *United States*, 261 U. S. 502 (1923) 13, 39
Parham v. *The Justices*, 9 Geo. 341 (1850) 32
Perrin v. *United States*, 4 Ct. Cl. 543 (1868), *aff'd*, 12 Wall. 315 (U. S. 1870) 27, 39
Portsmouth Harbor Land & Hotel Company v. *United States*, 260 U. S. 327 (1922) 17
Presbyterian Church v. *United States*, 33 Ct. Cl. 339 (1898) 26, 28
Pugh v. *United States*, 5 Ct. Cl. 113 (1869) 27
Pumpelly v. *Green Bay Company*, 80 U. S. 166 (1871) 18
Respublica v. *Sparhawk*, 1 Dall. 357 (Pa. 1788) 32
Richards v. *Washington Terminal Company*, 233 U. S. 546 (1914) 17-18

PAGE

Royal Holland Lloyd v. *United States*, 73 Ct. Cl. 722 (1931) 27

Ruppert v. *Caffey*, 251 U. S. 264 (1920) 35

Safeway Stores, Inc. v. *United States*, 118 Ct. Cl. 73 (1950) 9, 18

Salomon v. *United States*, 86 U. S. 17 (1873) 18

St. Regis Paper Company v. *United States*, 110 Ct. Cl. 271 (1948), *cert. denied*, 335 U. S. 815 (1948) 13, 35

Taylor v. *Nashville & Chattanooga R. R.*, 6 Coldwell 646 (Tenn. 1868) 32

Tide Water Associated Oil Company v. *United States*, (Court of Claims No. 48333) 3

United States v. *Causby*, 328 U. S. 256 (1946) 17, 53

United States v. *General Motors Corp.*, 323 U. S. 373 (1945) 10-11, 13, 16-17, 31

United States v. *Great Falls Mfg. Co.*, 112 U. S. 645 (1884) 18

United States v. *Lynah*, 188 U. S. 445 (1903) 18, 20

United States v. *Omaha Tribe of Indians*, 253 U. S. 275 (1920) 15

United States v. *Pacific Railroad*, 120 U. S. 227 (1887) 29-33, 35

United States v. *Penn Foundry & Manufacturing Co., Inc.*, 337 U. S. 198 (1949) 15

United States v. *Pewee Coal Company*, 341 U. S. 114 (1951) 11, 15-16, 18, 31

United States v. *Russell*, 80 U. S. 623 (1871) 10, 14, 19, 20, 43

United States v. *United Mine Workers of America*, 330 U. S. 258 (1947) 17, 18

United States v. *Welch*, 217 U. S. 333 (1910) 18

Walker v. *United States*, 34 Ct. Cl. 345 (1899) 28, 29

Wiggins v. *United States*, 3 Ct. Cl. 412 (1867) 10, 19, 26, 27-28, 43

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U. S. 579 (1952) 11, 17

TABLE OF STATUTES

PAGE

Act of February 27, 1815, 6 Stat. 150 (1790-1845) . . 36

Act of March 1, 1815, 6 Stat. 151 (1790-1845), and 6 Stat. 152, 153, 155, 186, 188, 194, 195 (1790-1845) 37, 39

Act of April 9, 1816, 3 Stat. 261 (1790-1845) 39

Act for Relief of Colonel Mitchell, 10 Stat. 727 (1852-1855) 20

Act of March 3, 1863, 12 Stat. 765 (1860-1863) 36

Act of July 4, 1864, 13 Stat. 381 (1864-1865) 25, 37

Act of June 18, 1866, 14 Stat. 360 (1866-1867) 25

Act of July 28, 1866, 14 Stat. 370 (1866-1867) 25

Act of January 31, 1867, 14 Stat. 617 (1866-1867) . . 37

Act of February 21, 1867, 14 Stat. 397 (1866-1867) . . 25

Act of March 2, 1867, 14 Stat. 572 (1866-1867) 25

Jt. Res. No. 5 of December 23, 1869, 16 Stat. 368 (1869-1871) 25

Jt. Res. of June 23, 1870, 16 Stat. 66 (1869-1871) . . 37, 38

Act of January 17, 1871, 16 Stat. 76 (1869-1871) 38

Act of March 3, 1879, 20 Stat. 134 (1877-1879) 38

Act of March 1, 1881, 21 Stat. 89 (1879-1881) 38

Act of May 1, 1882, 22 Stat. 13 (1881-1882) 38

Act of March 3, 1883 (the Bowman Act), 22 Stat. 485 (1881-1882) 25, 28, 29

Act of July 5, 1884, 23 Stat. 28 (1883-1885) 38

Act of March 3, 1887 (the Tucker Act), 24 Stat. 505 (1886-1887) 25

PAGE

Fifth Amendment to the Constitution of the United States (U. S. Const. Amend. V) 2

26 Halsbury's Statutes of England 468 *et seq.* 56

Philippine Rehabilitation Act of 1946, 60 Stat. 128 (1946), 50 U. S. C. App. § 1752 (1948) 56, 57

Requisition of Military Materials Act of October 16, 1941, 55 Stat. 742-43 (1942), as amended, 50 U. S. C. App. §§ 721-24 (1948) 41, 42

Title 28, United States Code, Section 1255(1) 2

MISCELLANEOUS AUTHORITIES

American States Papers, Class IX, Claims, Nos. 243 (p. 424) 536 (pp. 752-53), 587 (p. 835) 38, 39

Borchard, *Diplomatic Protection of Citizens Abroad* (1915) 262-64 43

Cong. Globe, 32d Cong., 1st Sess. 398, 493, 502, 543, 547, 651, 659-61, 695-96, 707 (1852) 20

Cong. Globe, 38th Cong., 1st Sess. 1010, 2774, 2778, 2781, 3188, 3418, 3499, 3513, 3532, 3535, 3536, 3544, 3547 (1863-1864) 25

Cong. Globe, 41st Cong., 3d Sess., 312-13 .....40, 41

II Halleck, *International Law* (4th ed. 1908) 70-71 ..44, 45

Conference for Codification of International Law, *Bases of Discussion*, Vol. III, Supp. (League of Nations Pub. 1929, V. 10) 20, 22 48

V Hackworth, *Digest of International Law* (1943) 705-06 48

PAGE

Lawrence Report, H. Rep. No. 134, 43d Cong., 2d Sess. 38, 54

1924 Opinions of Solicitor of Department of State 438-44 46

10 Ops. Att'y Gen. 21, 25-27 (1861) 20

40 Ops. Att'y Gen. 250, 253 (1942) 20

Remarks of Chief Justice Casey Regarding the Passing of Judge David Wilmot, 3 Ct. Cl. XLVI (1867) 27

Sen. Ex. Doc. No. 42, 42d Cong., 3d Sess., p. 2 41

Taylor, *International Public Law* (1901) 556 43

U. S. For. Rel., 1926, Vol. II 316-35 ..... 46, 47, 48, 49

Vattel, *Law of Nations*, Bk. III, c. 15, § 232 (1760) 32

Whiting, *War Powers under the Constitution* (43d ed. 1871) 17-18, 24 ..... 35, 44

Wolff, *The Science and Method of War* (1934 ed. of II *The Classics of International Law*) § 830 43

Wormser, *Collection of International War Damage Claims* (1944) 157 43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES, *Petitioner,* *v.* CALTEX (PHILIPPINES), INC., THE SHELL COMPANY OF PHILIPPINE ISLANDS LIMITED and STANDARD-VACUUM OIL COMPANY, *Respondents.*	No. 16

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR RESPONDENTS

Opinions Below

The majority and dissenting opinions of the Court of Claims (R. 44-61)* and the Special Findings of Fact (R. 30-44) which are made a part of the judgment of that Court entered herein on November 16, 1951 (R. 61) are reported at 120 Ct. Cl. 518 (100 F. Supp. 970).

*Unless identified by the symbol "II," record references are to pages in Vol. I of the printed transcript of record herein.

Jurisdiction to Review

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1255 (1).

Applicable Constitutional Provision

Fifth Amendment:

> ". . . nor shall private property be taken for public use, without just compensation."

Question Presented

Whether the United States is obligated under the Fifth Amendment to pay just compensation for private property which it took and used for military purposes in wartime and which it ultimately destroyed to deny its use to the enemy.

Statement of the Case

On December 31, 1941, representatives of the United States Armed Forces in the Far East (USAFFE) destroyed by demolition certain oil storage and distribution facilities in the Philippine Islands which had belonged to the respondents and over which USAFFE, in accordance with pre-existing war plans and in fulfillment of planned military policy, had exercised complete dominion and control since December 12, 1941. The operative facts surrounding and ante-dating such destruction were the subject of extensive proof in the Court of Claims, and that Court, after a lengthy trial of the issues raised, resolved the dispute to allow a recovery by the respondents under the "just compensation" provision of the Fifth Amendment.

Petitioner has not at any time disputed the taking and destruction of respondents' properties. It does, however, deny liability therefor, contending (a) that such properties were taken for the purpose of destroying them to prevent

their use by the enemy and (b) that a taking for such purpose is not compensable. The cases are now before this Court solely on the issue of liability presented by those contentions, the issue of damages having been reserved for future determination.

As it did in the Court of Claims, petitioner in this Court has chosen to frame its presentation of the cases almost without reference at all to the facts of intention to take, and the actual taking of, respondents' properties, as found by the Court of Claims in support of its judgment. Accordingly, we deem it necessary to state those facts.

The Facts

In early December of 1941 respondents were, and for a number of years prior thereto had been, engaged in the business of importing into and selling throughout the Philippine Islands a complete line of petroleum products. As an incident of that business they owned and operated throughout the Islands numerous oil storage and distribution facilities, including ocean terminals for receiving products shipped from the United States, the Netherlands East Indies and other oil-producing centers, and bulk plants for storing and distributing the products so received (FF 3, R. 30-31).

Caltex, Standard-Vacuum, Shell Philippines and Tide Water Associated* (hereinafter sometimes referred to, collectively, as the oil companies) each owned an ocean terminal on the Island of Luzon located in a section of the City of Manila known as Pandacan (hereinafter sometimes referred to, collectively, as the Pandacan terminals), such terminals being made up of oil storage tanks, pipelines, pumping equipment, dock facilities, warehouses, can-

* The claim of Tide Water Associated Oil Company has been settled and discontinued. *Tide Water Associated Oil Company* v. *United States* (Court of Claims No. 48333).

making machinery, motor equipment, rolling stock, etc., and petroleum products (FF 3, R. 30-31).*

Since such terminals represented the only practical and immediate source of petroleum products in the Philippines, the United States Army had early formulated war plans under which, in the event of an emergency, it would take over complete control not only of the facilities and supplies of the oil companies but also of their operating personnel (FF 1, 2, 4, 5, R. 30-31). Moreover, the intention of the Army, as contained in the war plans, to take and use the properties of the oil companies in the event of war was fully known to, and acquiesced in by, the oil companies (FF 7, R. 31-32).

In 1940 and 1941, and for a number of years prior thereto, all petroleum products used by the United States Army in the Philippines had been obtained from the oil companies under contract, on a day-by-day call or delivery basis. During that period the Army had on hand as a war reserve only a limited amount of petroleum products and had only limited facilities for the storage, handling and distribution of petroleum products (FF 8, R. 32).

In June, 1941, the Department Quartermaster (General Drake) called a meeting of officers on his staff and representatives of the oil companies in order to inform the oil

*Another such terminal belonging to Standard-Vacuum was located in part on the Island of Cebu and consisted of properties similar in nature to the properties comprising the Pandacan terminals of the oil companies (FF 36, R. 43). The Court of Claims held the Government liable on the claim of Standard-Vacuum for just compensation for the value of petroleum products at the Cebu installation destroyed on or about April 10, 1942, to deny their use to the Japanese, its decision being based upon the ground that what was done by the Army at Cebu on December 8, 1941, constituted a taking of such products for which just compensation was payable (R. 55-57). The Government did not petition for a review of that adjudication.

companies of the Army plan to take* and use in the event of war the petroleum products, the facilities and, because Army personnel would not be available to operate the properties when M-Day arrived, the operating personnel of the oil companies (FF 9, R. 32-33).

Shortly after the outbreak of war—specifically, on December 12, 1941—General MacArthur, through his Chief of Staff, issued orders to the Chief Quartermaster, USAFFE (General Drake), under which the latter officer was directed to, and under which he did in fact, take control of the operation of supply and distribution of the petroleum products of the oil companies and of the facilities and operating personnel of the oil companies (FF 14, 15, 16, R. 36-37). On that date representatives of the oil companies were advised, in a meeting called by the Army to effectuate its taking of the oil properties, that the Commanding Officer of the Quartermaster Depot, under the command of the Department Quartermaster, would be actively in charge of the properties (FF 15, R. 36). At the same time the Department Quartermaster told the Chief of the Real Estate Division of the Quartermaster Office that "we have taken over Pandacan, lock, stock, and barrel" (FF 16, R. 37).

Between December 12, 1941, and December 27, 1941, the properties of the oil companies were subject to the exclusive control of the Army (FF 17, R. 37). A control officer representing the Commanding Officer of the Quartermaster Depot was stationed at the terminals, and enlisted men, acting as security guards, commenced to patrol the area. All incoming orders for petroleum products were scruti-

*In referring to the intention of the Army, as contained in the war plans, to take and use the petroleum products, facilities and operating personnel of the oil companies in the event of war, the phrase "taking over" was used both by the representatives of the oil companies and by the many Army officers who were called to testify in the cases (FF 7, R. 31-32).

nized by the military; the control officers assisted in the supervision of civilian workmen (some of whom were in a labor pool established by the Army) engaged in packaging and loading petroleum products for shipment to the Army; and the personnel of the oil companies, while they remained on the job, were at all times subject to the authority of, and took instructions only from, Army personnel (FF 15-17, R. 36-37).

Under date of December 25, 1941, the Chief Engineer, USAFFE (General Casey), prepared a letter addressed to each of the oil companies and signed in his own name by command of General MacArthur. That letter, which was not delivered to its addressees until December 27, 1941 (FF 22, R. 39), is as follows (II R. 293):

HEADQUARTERS
UNITED STATES ARMY FORCES
IN THE FAR EAST
OFFICE OF THE COMMANDING GENERAL
MANILA, P. I.

IN REPLY REFER TO:

December 25, 1941

Asiatic Petroleum Co., Manila, P. I.
Tidewater Associated, Manila, P. I.
Caltex Corp., Manila, P. I.
Standard Vacuum Oil Co., Manila, P. I.

Dear Sirs:

Effective immediately all petroleum stocks, storage and handling facilities, etc., at your Manila, Pandacan oil depots are requisitioned by the U. S. Army. Any action deemed necessary for the destruction of this

property will be handled by the U. S. Army. However, your personnel must remain on duty under the direction of the U. S. Army and obey any instructions given them by the U. S. Army.

Your full and active assistance and cooperation are requested.

By command of General MacArthur:

(Signed) HUGH J. CASEY

HUGH J. CASEY
Colonel, C. E.
Engineers.

At least one of the oil companies received in addition a written receipt for its properties from the USAFFE officer placed in charge thereof after Manila was declared an Open City (FF 23, R. 39).

On December 27, 1941, the Chief Engineer, USAFFE, met with representatives of the oil companies and advised them that he was then in charge of their Pandacan terminals and urged upon them the necessity for expediting the delivery of petroleum products from the terminals to the Army (FF 24, R. 40).

Between December 27, 1941, and December 31, 1941, the Army continued its control over and use of the properties. An officer representing the Corps of Engineers was placed in active charge of the terminals; operations continued under the exclusive supervision of the Army, with shipments of petroleum products for the Army being expedited and a demolition network laid (FF 23, R. 39).

On December 31, 1941, the properties of the oil companies were destroyed by Army personnel acting under orders of the Chief Engineer, USAFFE, such destruction having been accomplished in order to prevent the facilities

and the petroleum products remaining therein from falling into enemy hands (FF 27, R. 41).

After liberation of the Philippines in February of 1945, the Army continued to occupy the site of the Pandacan terminals. However, in response to repeated requests of the oil companies, as the Army finished with its use of portions of the land from time to time during 1945 and 1946 it returned the same to the oil companies until all the land was once again in their possession (FF 28, R. 41).

The oil companies have been paid by petitioner for all stocks of petroleum products that were destroyed as a result of the demolition of the properties on December 31, 1941 (FF 31, 32, 33, R. 42).

Petitioner has also paid respondents Standard-Vacuum and Shell Philippines the value of certain tank cars, trucks and floating equipment located at their Pandacan terminals. Petitioner has refused, however, to pay respondents the value of the remaining facilities which were taken and used by the United States Army prior to December 31, 1941, and which were destroyed by the Army as a result of the demolition of the terminals on that date (FF 31, 32, 33, R. 42).

The Decision Below

On the basis of the foregoing facts, respondents contended in the Court of Claims that they were entitled, under the Fifth Amendment to the Constitution of the United States, to just compensation for their properties taken for public use; that such properties had been taken on December 12, 1941, from and after which date they were wholly deprived of all rights of ownership in and control over such properties; and, in any event, that such properties had been taken by formal requisition on December 27, 1941, and by the subsequent deliberate and intentional destruction thereof on December 31, 1941.

The Court of Claims, relying only upon its earlier decision in *Safeway Stores, Inc.* v. *United States*, 118 Ct. Cl. 73 (1950), rejected respondents' argument that the Army's acts with reference to the properties constituted a compensable taking of the Pandacan terminal facilities on December 12, 1941 (R. 47, 48).

The court held, however, that the formal requisitioning of the terminals on December 27, 1941, did constitute a compensable taking and that respondents' right to compensation was not impaired by the facts that the properties were taken in contemplation of destruction and that they were actually destroyed on December 31, 1941. In so holding, the court said (R. 54):

> "* * * The Government does not attempt to insure its citizenry against losses due to the ravages of war inflicted by our own or enemy forces in the conduct of a campaign. But when it is determined that a specific person's property because of its nature or location is so essential to war effort that it must be taken and put to use for the good of the nation, it is our belief that the public generally should bear the cost of acquisition. Ordinarily, time is not so much of the essence but that the ordinary procedures of eminent domain under civilian control are followed and just compensation determined and awarded as a matter of course. At times, however, the emergency may be so great and the time so short that an officer of the Government is justified in impressing the property summarily into service. Because the impressment is summary and dictated by immediate necessity would not seem to make it less an exercise of eminent domain. The Constitution provides that funds for the common defense shall be raised by a uniform method of taxation; it provides also that the owner of private property taken for public use—and the common defense is a public use—shall be justly compensated.

> "It appears to us that the destruction of the Pandacan terminals was a use thereof in the common defense and that a taking of plaintiffs' property for that purpose without making compensation therefor would be as much a violation of the Constitution as would a tax directed solely at a named individual."

Judgment was accordingly entered for the respondents, with a determination of the exact amount of recovery being reserved for further proceedings under Rule 38(c) of the Rules of the Court of Claims (R. 61).

Summary of Argument

I

The Court of Claims correctly held that the United States is obligated under the Fifth Amendment to pay just compensation for private property which it took and used for military purposes in wartime and which it ultimately destroyed to deny its use to the enemy. The question presented is not whether the circumstances under which private property is destroyed show a taking of that property by the United States, but whether an undisputed taking of private property is rendered non-compensable because accompanied by a purpose to destroy it. Petitioner's contention that such a taking is non-compensable is not supported by any authority. The decision of the Court of Claims is in accord with long-settled principles of constitutional law established by judicial decisions under the Fifth Amendment. *Mitchell* v. *Harmony*, 54 U. S. 115, 133-34 (1852); *United States* v. *Russell*, 80 U. S. 623, 627-29 (1871); *Grant* v. *United States*, 1 Ct. Cl. 41 (1863); *Wiggins* v. *United States*, 3 Ct. Cl. 412 (1867); *United States* v. *General Motors Corp.*, 323

U. S. 373, 378, 383-84 (1945); *United States* v. *Pewee Coal Company*, 341 U. S. 114, 117, 118-19 (1951); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 630-31 (1952).

II

The decision below is in accord with non-judicial interpretation of the obligation imposed upon the United States by the Fifth Amendment. The Congress, during periods when the Court of Claims was without jurisdiction to decide claims against the United States under the Fifth Amendment, has consistently recognized by private legislation the obligation of the United States to compensate owners of non-enemy property destroyed to prevent its falling into enemy hands.

III

The principles of constitutional law applied by the court below are consistent with principles of international law established without reference to the Constitution of the United States. The United States, through its Department of State, has formally presented to foreign countries its view that under international law a belligerent is obligated to indemnify the owner of non-enemy property destroyed to prevent its falling into the hands of an enemy.

IV

Petitioner's arguments addressed to the expediency of compliance with its constitutional obligation do not afford any basis for challenging the correctness of the decision below. The possibility that the fortunes of war might have resulted in non-compensable property loss to respondents is

criminate between property destroyed to prevent it from falling into the hands of an enemy, and property taken for the actual sustenance of our own military forces. In both cases it is treated as a taking for public use. In the case of the *American Print Works* v. *Lawrence*, (Zabriskie,) the Supreme Court of New Jersey affirm that 'the destruction of private property for public use is a taking of it within the meaning of the Constitution.'

"We hold, in this case, that the property was destroyed by the rightful order of the commanding officer, and upon an urgent and pressing necessity, and to prevent it from falling into the hands of the public enemy and those hostile to the United States; that it was a taking for public use; and that the government is bound under the Constitution to make just compensation to the owner. The legal duty to make compensation raises an implied promise to do so; and here is found the jurisdiction of this court to entertain this proceeding."

Shortly after the *Grant* decision, and while the War between the States was still in progress, Congress was pressed to enact legislation which would relieve certain loyal citizens from the hardships of war which were cast upon them by reason of their residence within the lines of the Confederacy or in loyal states in which hostilities were then being actively conducted.* In considering that matter Congress reviewed

*The War between the States, in which the conflict was between citizens of the same country, necessarily presented war-damage problems different from those arising out of the normal situation of country against country. Thus, considerations involving the loyalty of the owner of the property, its location at the time of damage (whether within Confederate or Union lines), the number of claims filed and the very real possibility of fraudulent claims suggested the desirability of having the Congress, rather than the Court of Claims, administer the requirements of the Fifth Amendment. However, no such problems arose during or after World War II.

generally the question of war claims against the Government and concluded that in respect of claims growing out of the War between the States it, rather than the Court of Claims, should assume the responsibility of determining the claims to be allowed and the extent to which the national treasury should be burdened with the payment thereof. Accordingly, it enacted legislation removing from the jurisdiction of the Court of Claims claims against the United States based on acts of the Army or Navy in the suppression of the rebellion, the terms of the first such Act specifically providing (13 Stat. at 381):

> ". . . That the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof."*

It is because of that statute and others complementing its application that the Court of Claims, subsequent to its decision in the *Grant* case, did not continue to grant compensation for denial takings *during the War between the States*. *Cf. Beasely* v. *United States*, 21 Ct. Cl. 225 (1886); *Myers* v. *United States*, 22 Ct. Cl. 80 (1887); *Nelson* v. *United States*, 22 Ct. Cl. 159 (1887); *Madison*

*Act of July 4, 1864, 13 Stat. 381 (1864-1865). For the legislative history of the Act (H. R. No. 305), see Cong. Globe, 38th Cong., 1st Sess. 1010, 2774, 2778, 2781, 3188, 3418, 3499, 3513, 3532, 3535, 3536, 3544, 3547 (1863-1864). See also Act of June 18, 1866, 14 Stat. 360 (1866-1867); Act of July 28, 1866, 14 Stat. 370 (1866-1867); Act of February 21, 1867, 14 Stat. 397 (1866-1867); Act of March 2, 1867, 14 Stat. 572 (1866-1867); Jt. Res. No. 5 of December 23, 1869, 16 Stat. 368 (1869-1871); Act of March 3, 1883 (the Bowman Act), 22 Stat. 485 (1881-1882); Act of March 3, 1887 (the Tucker Act), 24 Stat. 505 (1886-1887). No similar legislation was enacted in connection with any other war in which the United States has engaged.

Female Institute v. *United States,* 23 Ct. Cl. 188 (1888); *Conard* v. *United States,* 25 Ct. Cl. 433 (1890); *Brown* v. *United States,* 29 Ct. Cl. 394 (1894); *Presbyterian Church* v. *United States,* 33 Ct. Cl. 339 (1898).

Thus, in the *Myers* case, which apparently was concerned with non-enemy property destroyed to prevent it from falling into the hands of the enemy, the court said (22 Ct. Cl. at 81):

> "It was stated in the argument, though not alleged in the petition, that the boat was burned by the defendants to prevent it falling into the hands of the enemy, which fact, it is urged, would [not] deprive this court of jurisdiction under section 1059. If this position were well taken, the court would still be without jurisdiction under the Bowman Act, the third section of which provides that 'the jurisdiction of said court shall not extend to or include any claim against the United States growing out of the destruction or damage to property by the Army or Navy during the war for the suppression of the rebellion.
>
> "*However just this claim may be, the court has no power to consider it,* and the petition is therefore dismissed." [Emphasis supplied]

Although the jurisdiction of the Court of Claims was withdrawn in respect of war claims arising out of the War between the States, its general jurisdiction remained unchanged for purposes of deciding claims seeking compensation for property otherwise taken by the United States and destroyed to prevent its falling into enemy hands. Accordingly, when the question was again presented in *Wiggins* v. *United States,* 3 Ct. Cl. 412 (1867), the rationale of the *Grant* decision was emphatically reaffirmed.* Since

*Other cases in which the *Grant* decision has been cited with approval include *Meade* v. *United States,* 2 Ct. Cl. 224, 275 (1866);

no answer to a claim for a compensable taking. Petitioner's argument that respondents' properties would have been lost in any event is wholly speculative and unsupported by the record. Furthermore, the issue of liability is to be determined on the basis of what was done by the United States, not what might have happened if the United States had not taken the property.

Finally, petitioner's argument that its constitutional obligation to pay just compensation for private property taken for public use should be circumscribed by considerations of the amount of potential liability has no basis in law or morality. The greater the value of the property taken for the good of the nation, the more compelling is the requirement of the Fifth Amendment that the public generally bear the cost of acquisition.

ARGUMENT

THE COURT OF CLAIMS CORRECTLY HELD THAT THE UNITED STATES IS OBLIGATED UNDER THE FIFTH AMENDMENT TO PAY JUST COMPENSATION FOR PRIVATE PROPERTY WHICH IT TOOK AND USED FOR MILITARY PURPOSES IN WARTIME AND WHICH IT ULTIMATELY DESTROYED TO DENY ITS USE TO THE ENEMY.

Underlying much of petitioner's argument in these cases is its apparent failure to recognize that the claims here presented are claims under the Constitution of the United States —not mere appeals to the discretion of a sovereign government—and that the constitutional test of compensability is that private property be taken for a public use. Destruction of private property for public purposes is no less a

public use than is a use through which property is kept in service or consumed. *United States* v. *General Motors Corp.*, 323 U. S. 365 (1945).

Petitioner argues at length (*e.g.*, Br., pp. 12-14, 23-24, 37-38, 40, 51-53, 62-63) that a mere destruction of private property by a governmental agency does not necessarily constitute a "taking" of that property within the constitutional protection—a proposition which we do not here challenge. There are, of course, cases where the circumstances of destruction do not establish the deliberate intention to take which is characteristic of a contractual obligation but, rather, point to an incidental destruction of private property as a necessary by-product of a governmental act directed at some other objective. As this Court stated in *Omnia Commercial Company* v. *United States*, 261 U. S. 502, 508-09 (1923):

> ". . . But destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense. . . . There are many laws and governmental operations which injuriously affect the value of or destroy property—for example, restrictions upon the height or character of buildings, destruction of diseased cattle, trees, etc., to prevent contagion—but for which no remedy is afforded. . . ."*

But such cases are wholly beside the point here. We are not presently concerned with the question whether the mere fact of destruction may properly give rise to an inference that the property was "taken". We are, instead, dealing with a situation in which private property has concededly

*See, *e.g.*, *Miller* v. *Schoene*, 276 U. S. 272 (1928); *North American Storage Co.* v. *Chicago*, 211 U. S. 306 (1908); *Lawton* v. *Steele*, 152 U. S. 133 (1894); *St. Regis Paper Co.* v. *United States*, 110 Ct. Cl. 271 (1948), *cert. denied*, 335 U. S. 815 (1948).

been taken, deliberately and intentionally,* but where the constitutional obligation to pay just compensation for it is sought to be avoided solely upon the ground that the public use for which the property was taken was use by destruction to deny it to the enemy rather than use by occupation. The Fifth Amendment does not contain any such exception to the obligation that it imposes, nor does any judicial decision support the contention that there is any such exception.

1. The decision below is in accord with long-settled principles of constitutional law established by judicial decisions under the Fifth Amendment.

The Court of Claims has found as facts (a) that prior to the outbreak of war the Army had formulated war plans looking toward seizure of the properties of the oil companies in the event of an emergency, (b) that after the outbreak of war—specifically, on December 12, 1941—in accordance with the instruction of those war plans, the Army took possession and operating control of the properties of the oil companies and (c) that from that date until December 27, 1941, when the properties were formally requisitioned by the Army, they remained under the exclusive control of the Army and were used by it for its own purposes.

Petitioner apparently does not dispute the accuracy of those facts—nor, indeed, can it do so in this Court. See, *e.g.*, *United States* v. *Russell*, 80 U. S. 623, 631 (1871);

---

*"On December 27, 1941, the United States Army requisitioned all remaining petroleum stocks, and all storage and handling facilities at the Pandacan terminals of the oil companies. The requisition was in anticipation and for the purpose of destruction to prevent items of military value from falling into the hands of the enemy." (FF 30, R. 41-42)

United States v. *Omaha Tribe of Indians*, 253 U. S. 275, 281 (1920); *United States* v. *Penn Foundry & Manufacturing Co., Inc.*, 337 U. S. 198, 205 (1949). It does, however, contend that the taking of December 27, 1941, was not one for the consequences of which the Government is legally (even if morally) responsible.

Viewed realistically, what the Army did, during a time of extreme emergency, was to seize the properties of the oil companies for the exclusive use of the Army. To be sure, such seizure was effected with the complete cooperation of the oil companies—who made available to the Army not only the whole of their petroleum stocks and storage and distribution facilities but also their highly-trained personnel for operating purposes. As a practical matter, however, the seizure of such properties conformed in all respects with authorized Army procedure in taking, using and destroying respondents' motor vehicles, floating equipment and the like (for which in most instances full compensation has heretofore been paid by petitioner). Indeed, with the possible exception of the presence here of the element of patriotic cooperation, the situation in point of law was not different from the Government seizure of plaintiff's coal mines in *United States* v. *Petvee Coal Company*, 341 U. S. 114 (1951).

Although petitioner has failed even to mention this Court's opinion in that case, the fact remains that the Governmental acts there involved were held (without a dissent on the point) to constitute a taking of the plaintiff's property. Thus Mr. Justice Black, who announced the judgment of the Court, after first pointing out that "whether there is a 'taking' must be determined in light of the particular facts and circumstances involved", made the following statement in which Justices Frankfurter, Douglas and Jackson joined (341 U. S. at 117, 118-19):

> ". . . Whatever might have been Pewee's losses had it been left free to exercise its own business judgment, the crucial fact is that the Government chose to intervene by taking possession and operating control. By doing so, it became the proprietor and, in the absence of contrary arrangements, was entitled to the benefits and subject to the liabilities which that status involves."

Mr. Justice Burton, who wrote with the concurrence of the Chief Justice and Justices Clark and Minton, also recognized that there was a "taking" of the properties but decided against allowance of compensation for the stated reason that "There is no showing that anything of compensable value was taken by the Government from the company, or that the Government subjected the company to any pecuniary loss" (341 U. S. at 122). It is, of course, too obvious for argument that in the present cases the Government took from respondents "something of compensable value" and that the intentional acts of the Government "subjected [respondents] to a pecuniary loss".

This Court in the *General Motors* case* also gave consideration to the scope and meaning of the Fifth Amendment under circumstances pertinent to the present issue (323 U. S. at 378, 383-84):

> "In its primary meaning, the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of

United States v. *General Motors Corp.*, 323 U. S. 373 (1945), involving a claim of compensation for property voluntarily surrendered to, and subsequently partially destroyed by, the Government.

acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking.

"For fixtures and permanent equipment destroyed or depreciated in value by the taking, the respondent is entitled to compensation. An owner's rights in these are no less property within the meaning of the Fifth Amendment than his rights in land and the structures thereon erected. And it matters not whether they were taken over by the Government or destroyed, since, as has been said, destruction is tantamount to taking [citing cases]. This is true whether the fixtures and equipment would be considered such as between vendor and vendee [citing cases], or as a tenant's trade fixtures [citing cases]. In respect of them, the tenant whose occupancy is taken is entitled to compensation for destruction, damage or depreciation in value [citing cases]. And since they are properly distinct from the right of occupancy such compensation should be awarded not as part of but in addition to the value of the occupancy as such."

The concurring opinion of Mr. Justice Douglas expressly approves the ruling of the Court that "respondent is entitled to compensation for fixtures and permanent equipment destroyed or depreciated in value by the taking" (323 U. S. at 384). See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 630-31 (1952); *United States* v. *United Mine Workers of America*, 330 U. S. 258, 284-85 (1947); *United States* v. *Causby*, 328 U. S. 256, 261-63 (1946); *International Paper Co.* v. *United States*, 282 U. S. 399, 406 (1931); *Portsmouth Harbor Land & Hotel Company* v. *United States*, 260 U. S. 327, 329-30 (1922); *Richards* v. *Washington Terminal Company*, 233 U. S. 546, 557-58

(1914); *United States* v. *Welch*, 217 U. S. 333, 338-39 (1910); *United States* v. *Lynah*, 188 U. S. 445, 464-65, 474 (1903); *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 657-58 (1884); *Salomon* v. *United States*, 86 U. S. 17, 19-20 (1873); *Pumpelly* v. *Green Bay Company*, 80 U. S. 166, 177-78 (1871).

Relying upon the foregoing authorities—particularly the decisions of this Court in *Pewee Coal* and *United Mine Workers*—we argued that in point of fact there had been a taking of respondents' properties on December 12, 1941, on and after which date the properties were used and exclusively controlled by the Army. Although the facts found by the Court of Claims establish that from and after December 12, 1941, respondents were wholly deprived of all control over their properties (FF 15, 16, 17, R. 36-37), the court expressed its belief that the control exercised by the Army between December 12 and December 27, 1941, did not amount to a taking of the terminal facilities (R. 47).*

If it were open to us to argue the facts in this Court, we would urge that the circumstances surrounding the Army's acts on December 12, 1941, constituted a taking of respondents' properties on that date, without more.

However that may be, the Court of Claims has expressly found as a fact that the terminal facilities of the oil companies were taken on December 27, 1941, when the properties were formally requisitioned (FF 30, R. 41-42) and thereafter used by the Army until December 31, 1941, on which date, while still in the exclusive possession and control

*The only case cited in support of that holding was its own decision in *Safeway Stores, Inc.* v. *United States*, 118 Ct. Cl. 73 (1950). But the *Safeway* opinion makes it perfectly plain that the properties there involved were returned intact to the owner and that the Government did not assume possession and operating control of the properties. The situation here is, of course, entirely different.

of the Army, they were destroyed by the Army to deny their use to the enemy (FF 23, 27, 30, R. 39, 41, 42).

The conclusion that the taking for public use found by the Court of Claims is compensable under the Fifth Amendment is not only in accord with, but is compelled by, the decisions holding that the mere act of denial destruction constitutes in and of itself a compensable taking of property within the protection of the Fifth Amendment. *Mitchell* v. *Harmony*, 54 U. S. 115 (1852); *United States* v. *Russell*, 80 U. S. 623 (1871); *Grant* v. *United States*, 1 Ct. Cl. 41 (1863); *Wiggins* v. *United States*, 3 Ct. Cl. 412 (1867).

The opinion of Chief Justice Taney in *Mitchell* v. *Harmony*, 54 U. S. 115 (1852), contains probably the earliest judicial pronouncement that just compensation must be paid for non-enemy property destroyed in non-enemy territory to deny its use to the enemy. In that case plaintiff sued Colonel Mitchell in trespass, for the allegedly unauthorized taking of his property during the Mexican War, and won a jury verdict of over $95,000. Mitchell appealed to the Supreme Court on the grounds (a) that seizure of the property was lawful in light of the then-existing immediate and impending danger and (b) that the jury had been incorrectly charged to the extent that it had found such danger not to exist. The Supreme Court, in affirming the judgment of the court below, took note of Colonel Mitchell's defense of justification based on preventing the property from falling into enemy hands (54 U. S. at 131) and went on to say (54 U. S. at 133-34):

> "*There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy*; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. *Unquestionably, in such cases, the*

government is bound to make full compensation to the owner; but the officer is not a trespasser." [Emphasis supplied]*

Thus, the rule was early announced that a destruction of property to deny its use to the enemy is a taking thereof for public use and that the fact of destruction does not relieve the Government from the payment of just compensation under the Fifth Amendment. See also *United States* v. *Russell,* 80 U. S. 623, 627-29 (1871); *Dow* v. *Johnson,* 100 U. S. 158, 169 (1879); *United States* v. *Lynah,* 188 U. S. 445, 477 (1903); *Hirsh* v. *Block,* 267 Fed. 614, 621 (App. D. C. 1920); 10 Ops. Att'y Gen. 21, 25-27 (1861); 40 Ops. Att'y Gen. 250, 253 (1942).

In *John P. Baldwin* v. *United States,* Rep. No. 259 from the Court of Claims to the House of Representatives, 36th Cong., 2d Sess. (1860-61), the question of the compensability of a denial taking was considered for the first time by the Court of Claims. There an American-owned vessel which had been wrecked on a Florida beach was burned by officers of the United States to prevent certain quantities of lead and other contents of the vessel from falling into the hands of the Seminole Indians, with whom the country was then at war. With regard to the liability of the Government to compensate the owner for the loss of the vessel and her contents, the Court of Claims said, speaking through Judge Loring (pp. 15-16):

"It was argued that the United States had a right to destroy the property, because in its position

*The legislative history of the Act [10 Stat. 727 (1852-55)] passed to relieve Mitchell from losses sustained in obedience to a command of his superior officer shows clearly the recognition by Congress of an obligation in any event to compensate Harmony for the property taken. Cong. Globe, 32nd Cong., 1st Sess. 398, 493, 502, 543, 547, 651, 659-61, 695-96, 707 (1852).

'it was dangerous with reference to the war and the enemy.' The United States had the right to destroy it, but not because it was a nuisance, in its nature pernicious to everybody, and therefore abatable by anybody, but only for the public good, and then subject to the constitutional provision.

"It then was contended that the case shown was not one of taking private property for public use, but 'simply preventing private property being taken by the public enemy to be used against private citizens and against the government;' *but this was a public use, and the cost of it is to be borne by the public, who were benefited by it. We think the case is within the provision of the Constitution, on which the petitioner relies.*'

"It was then contended that this provision of the Constitution could not avail the petitioner because there was no act of Congress carrying the provision into effect; but none is necessary. The Constitution imposes on the United States the obligation of furnishing an indemnity for the property taken, and upon that obligation an implied contract arises, upon which, under the statute constituting this court, a claim against the United States may be maintained here.

"We are of opinion that the petitioner is entitled to recover. . . ." [Emphasis supplied]

Again in *Grant* v. *United States,* 1 Ct. Cl. 41 (1863), the Court of Claims considered at length the compensability of a denial taking. Grant had contracted with the Government to furnish certain quartermaster supplies for the forts and military posts in Arizona and had in his mills and storehouses valuable supplies belonging to the Government. In 1861 the people of Tucson were intensely hostile to the Government of the United States and openly talked of secession long before the War between the States was actually

commenced. Accordingly, when the commanding officer of the United States troops in the vicinity of Tucson received information that the fort he occupied was to be abandoned and destroyed, he ordered a subordinate officer to destroy such Government stores as could not be removed from the fort, together with such private property of Grant as might be of value to the public enemy or to the disloyal people of Tucson. That order was carried out and the property of Grant destroyed.

It seems clear that in the *Grant* case the military had not, as here, used the claimant's property prior to its destruction. In spite of that fact, however, the Court of Claims held that compensation was payable to Grant for the destruction of his properties to prevent them from falling into enemy hands, saying in that regard (1 Ct. Cl. at 44-45):

> "... It may safely be assumed as the settled and fundamental law of Christian and civilized States that governments are bound to make just indemnity to the citizen or subject whenever private property is taken for the public good, convenience, or safety.
>
> "The limitation imposed on the government of the United States in the exercise of its right of *eminent domain* by the fifth article of the amendments of the Constitution is a solemn recognition of this settled and fundamental law of States, and binds the government to the observance of the principles of justice and right in its dealings with the citizen with the force of organic law. In this article it is declared that 'private property shall not be taken for public use without just compensation.'

The court then considered, and rejected, the argument of the Government that the property for which compensation was claimed had been taken under the common-law principle of overruling necessity rather than in the exercise of the right of eminent domain and, after stating that the law of

overruling necessity was applicable only in an action against individuals, not in an action against the State, concluded as follows (1 Ct. Cl. at 46-47, 50):

> "Upon the authority of the cases cited, and others that might be adduced, as well as on the principles which distinguish a case of public necessity, utility, or good, from the overruling necessity which regulates the law of individuals, we are of opinion that the rightful taking of private property for use or destruction, when the public exigency demands it, by a military officer commanding any part of the public force, is an exercise of the right of *eminent dòmain*, and that such a case is not governed by the law applicable to individuals.
>
> ". . . The exigencies of war forbid that the legislature should provide for the precise circumstances under which the eminent right of the State may be called into action. The fundamental law provides that private property shall not be taken for public use without just compensation. Is this provision of the Constitution answered when compensation is made for property taken under legislative authority, and denied when taken by military officers acting rightfully under the proper functions of their office? We think not. The obligation to make compensation is co-extensive with the right of the State to take private property for public use; and whenever it is taken by competent authority, the obligation of the State cannot be evaded.
>
> ". . .
>
> "Private property must not only be taken upon urgent necessity, but for public use, in order to fix the liability of the government to make compensation. Was the destruction of this property a taking of it for public use? It is almost of equal public importance that military supplies be kept from the use of the enemy, as that they minister to the support of our own armies. Writers on public law do not dis-

the facts of the *Wiggins* case are important to an understanding of its decision, they will be given at some length.

In 1854, San Juan del Norte, or Greytown, in the State of Nicaragua, became the rendezvous of marauders and freeboooters whose activities materially interfered with passage across Central America to the Pacific, which passage was a matter of great importance to the Government and people of the United States. After one of the accredited foreign ministers of the United States to a South American republic, on his way to or from his post, had been treated with great indignity and violence and citizens of the United States otherwise injured in their property, the President of the United States, through the Secretary of the Navy, ordered Commander Hollins to proceed to Greytown to seek and enforce reparations for the insult to the United States and for the injuries inflicted upon its citizens. This Commander Hollins did, and when his demands for indemnity and suitable apologies were treated with indifference or contempt, he promptly destroyed the city.

It was then suggested to Commander Hollins that the inhabitants of Greytown might take revenge for the punishment he had inflicted upon them and that in that regard a large quantity of powder owned by plaintiff and located across the bay from Greytown in the neutral territory of Punta Arenas might be used to destroy American-owned property. Accordingly, Commander Hollins seized the powder and cast it into the bay, to prevent its being used by the enemy. For this destruction plaintiff claimed compensation from the Government of the United States, and

---

3 Ct. Cl. XLVI (1867); *Perrin* v. *United States*, 4 Ct. Cl. 543, 547 (1868) (pointing up the distinction between a denial taking and battle damage); *Pugh* v. *United States*, 5 Ct. Cl. 113, 117 (1869); *Booth & Company* v. *United States*, 62 Ct. Cl. 288, 295 (1926); *Royal Holland Lloyd* v. *United States*, 73 Ct. Cl. 722, 733 (1931); *Miller* v. *Horton*, 26 N. E. 100, 102 (Mass. 1891—opinion by Judge, later Mr. Justice, Holmes).

in upholding his claim, the Court of Claims said (3 Ct. Cl. at 422):

> "We do not see how this case can be distinguished in principle from that of *Grant* v. *The United States*, I. C. Cls., p. 41. There the property of a citizen, in one of the Territories of the United States, was destroyed to prevent it from falling into the hands of the insurrectionary forces. Judge Wilmot reviews at length the grounds of the claim, and the authorities bearing upon the subject, and shows most clearly and conclusively that, whether the property be taken and appropriated by right of eminent domain, or destroyed to prevent other or greater injury to the public, the party is entitled to compensation. That this results as well from the principles of natural justice and equity as from the constitutional injunction to make compensation for private possessions devoted to public ends. We are entirely satisfied with the grounds there assumed, so far as they are applicable to the facts of this case, and can add nothing to the cogency or conclusiveness of the reasoning. Nor is it necessary to support it by further citations of authorities."

Petitioner refers (Br., p. 28) to *Walker* v. *United States*, 34 Ct. Cl. 345 (1899), and *Presbyterian Church* v. *United States*, 33 Ct. Cl. 339 (1898), as expressing disapproval, by way of dictum, of the earlier *Grant* and *Wiggins* decisions. But both of those cases were decided at a time when the Court of Claims was deprived of jurisdiction to consider denial claims arising out of the War between the States, a fact which is of obvious importance in correctly appraising the statement that a taking under such circumstances is one for which the Court of Claims could not grant compensation. Indeed, the *Walker* case itself, holding that the taking of a schooner and its subsequent destruction was compensable in the Court of Claims within the jurisdictional

limitation of the Bowman Act*, held that a taking is compensable notwithstanding that the ultimate use to which the property was put involved its destruction. Thus the court pointed out (34 Ct. Cl. at 346-47):

> ". . . In cases of implied contract, it was established by the decision of the Supreme Court in *Salomon's Case* (19 Wall., p. 17) that where private property was delivered to an officer for public use a contract will be implied though the property was not used, and the Government received no benefit from it. As a general principle, it may be said that where private property is taken for public use under conditions which will authorize a court to hold it a case of implied contract, the title passes to the Government, *eo instanti*, and it is no concern of the owner as to what use or purpose the Government puts it or whether the property perishes in its hands."

Petitioner relies most heavily upon what the court below correctly termed a *dictum* of this Court in *United States* v. *Pacific Railroad*, 120 U. S. 227 (1887).

The background of the *Pacific Railroad* controversy may be summarized as follows. Between August 14, 1867, and July 22, 1872, the Pacific Railroad Company rendered to the Government of the United States certain services involving the transportation of passengers and freight. When called upon to pay the charges for such services, the Government did not contest the extent and value thereof

---

*Act of March 3, 1883, 22 Stat. 485 (1881-1882). Although the original legislation withdrawing from the jurisdiction of the Court of Claims claims for property losses sustained by reason of military action in the War between the States excluded all claims growing out of either destruction or appropriation of property, the Bowman Act continued the jurisdictional exclusion only as to claims growing out of destruction or damage to property, thereby permitting claims for other property losses. Accordingly, cases such as the *Walker* case, arising under the Bowman Act and subsequent amendatory legislation, quite properly recognized a distinction, for purposes of that jurisdictional legislation, between property taken for destruction and property taken for a "use" other than destruction. That distinction, however, has no relevance to the obligation imposed on the United States by the Fifth Amendment.

but rather sought to offset the cost to it of four bridges which it had built over the Company's lines some eight years earlier, during the War between the States, to replace other bridges which had been destroyed, two by Confederate forces and two by Union forces, in the conduct of that war. The Company had not made any claim for the destruction of its bridges, so that the only question before the Court for decision was whether the Company was chargeable for the bridges constructed on its property by the United States for purposes of facilitating military operations.

The Court held that private parties cannot be charged for works constructed on their lands by the Government to further the operations of its armies and, therefore, that the Company was entitled to the full amount of its claim for services rendered (120 U. S. at 239-40). However, in the course of his opinion Mr. Justice Field considered the question whether the Government had incurred any obligation in respect of the two bridges destroyed by Union forces. In that connection he discussed the compensability of war damage generally, stating that the "destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences." (120 U. S. at 234). He further stated, with respect to the practice of the Government to make compensation for property taken for the service of its armies, such as vessels, steamboats and the like, or buildings and supplies, that (120 U. S. at 239):

> ". . . Its obligation to do so is supposed to rest upon the general principle of justice that compensation should be made where private property is taken for public use, although the seizure and appropriation

of private property under such circumstances by the military authorities may not be within the terms of the constitutional clause. *Mitchell* v. *Harmony*, 13 How. 115, 134; *United States* v. *Russell*, 13 Wall. 623."

Although the decision itself reaches the same result as if the destruction of the bridges had been thought to constitute a compensable taking, the observations of Mr. Justice Field on the subject of compensability of wartime property seizures are not readily reconcilable, on their face, with any other judicial decision or dictum on that subject.

It may be that the factual circumstances of the destruction of the bridges in that case were regarded by Mr. Justice Field as pointing more to incidental war damage rather than to a deliberate and intentional "taking". To the extent, however, that his conclusion was based upon the proposition that no wartime seizures are compensable as a matter of constitutional right, it is clearly in conflict with the authorities cited in support of that position (*Mitchell* v. *Harmony* and *United States* v. *Russell*) and is in conflict with all other decisions of this Court dealing with emergency seizures of private property (*e.g.*, *United States* v. *General Motors Corp.*, *supra* at pp. 16-17; *United States* v. *Pewee Coal Company*, *supra* at pp. 15-16). Indeed, even the petitioner here does not contend for any such proposition, but concedes that at least a wartime seizure which does not contemplate destruction of the seized property is compensable. It has, in fact, paid respondents for the stocks of petroleum products at the Pandacan terminals, including the stocks remaining at the time of the demolition on December 31, 1941.

It is, of course, possible that Mr. Justice Field's observations were directed solely at seizures of property during the

War between the States, as to which the Congress had withdrawn jurisdiction from the Court of Claims and thereby left the owners of seized property with no remedy other than an appeal to the sense of "justice" of the Congress.

However that may be, neither the observations of Mr. Justice Field nor the authorities cited by him* lend any support to petitioner's contention in these cases that a taking of private property which would be compensable if it contemplated continued use of the property in service, is non-compensable if it contemplated ultimate destruction of the property. On the contrary, Mr. Justice Field cited with evident approval the views of Vattel, which he paraphrased as follows (120 U. S. at 234):

> ". . . those [damages] done by the state deliberately and by way of precaution, as when a field, a house, or a garden, belonging to a private person, is taken for the purpose of erecting on the spot a town rampart or other piece of fortification; *or when his standing corn or his storehouses are destroyed to prevent their being of use to the enemy . . . are to be made good to the individual, who should bear only his quota of the loss. . . .*" [Emphasis supplied]

---

*E. g., *Respublica* v. *Sparhawk*, 1 Dall. 357 (Pa. 1788) (involving property destroyed *by the enemy*); *Parham* v. *The Justices*, 9 Geo. 341 (1850) (involving injunctive relief); *Taylor* v. *Nashville & Chattanooga R. R.*, 6 Coldwell 646 (Tenn. 1868) (involving the *legality* of destruction), none of which cases have any bearing at all on the compensability under the Fifth Amendment of a denial taking. Mr. Justice Field also referred to certain Congressional claims which were concerned with damage sustained to property in the hands of the enemy or with battle damage, *e. g.*, when a levee was cut to prevent British troops from bringing up their cannon during the War of 1812. For a discussion of such claims, as also cited by petitioner (Br., pp. 40-51), see *infra* at pp. 36-41.

Mr. Justice Field also cited *Mayor* v. *Lord*, 18 Wend. 126 (N. Y. 1837). But that case, which held that an *individual* is not liable for property destroyed to meet an emergency, expressly recognized the liability of the *State* for such losses (18 Wend. at 130). Indeed, the decision of the New York Supreme Court in that case (which was affirmed by the Court of Errors) stated specifically (17 Wend. at 291):

> "... But the obvious answer is, that in all cases of the kind, the individual concerned in the taking or destroying of the property is not personally liable. If the public necessity in fact exists, the act is lawful. Thus, houses may be pulled down, or bulwarks raised for the preservation and defense of the country, without subjecting the persons concerned to an action, the same as pulling down houses in time of fire; *and yet these are common cases where the sufferers would be entitled to compensation from the national government within the constitutional principle. Const. U. S., Art. 5 of the Amendments.*" [Emphasis supplied]

The opinion of this Court in *Juragua Iron Company* v. *United States*, 212 U. S. 297 (1909), upon which petitioner places considerable emphasis, is likewise not authority for the contention that respondents are not here entitled to just compensation. That action was brought by an American corporation to recover the value of property in Cuba which had been destroyed by American forces for sanitary reasons during the war with Spain. The decision of this Court was clearly based on the proposition that property located in enemy territory, no matter by whom owned, is enemy property, for the destruction of which the Government is not liable under the Fifth Amendment. The following brief

quotation from the opinion of this Court should remove any doubt as to the basis of decision (212 U. S. at 305-06, 308):

> ". . . We say 'enemy's country' because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there were, pending such war, to be deemed enemies of the United States and of all its people. The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject under the laws of war to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy.
>
> ". . .
>
> "In view of these principles—if there were no other reason—the plaintiff corporation could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war, any more than a Spaniard residing there could have done, under like circumstances, in reference to his property then in that island."

In view of that unequivocal statement, it is difficult to see how petitioner can properly cite the case as authority for its contention that compensation is not payable for a denial destruction of *non-enemy* property located in *non-enemy* territory being used for *loyal* purposes. To say that "there is no basis for hinging the right to compensation upon

the location of the property in enemy or friendly territory" (Br., p. 37) is to claim that the enemy is entitled to the same rights under our Constitution as the people of the United States. We do not believe that petitioner would seriously urge such a proposition.

The *Pacific Railroad* and *Juragua* cases are the only judicial authorities cited by petitioner against the correctness of the decision below—and, as we have shown above, those cases simply do not support its position.

Apparently realizing the necessary effect of its inability to refer the Court even to one case directly upholding its contention, petitioner has cited (Br., pp. 21-25) a number of cases decided under, or involving an interpretation of, various legislative enactments of *general* applicability imposing emergency measures of regulation or control. See, *e.g.*, *St. Regis Paper Company* v. *United States*, 110 Ct. Cl. 271 (1948), *cert. denied*, 335 U. S. 815 (1948) (legislation allocating and controlling the use of war materials); *Bowles* v. *Willingham*, 321 U. S. 503 (1944) (price-control legislation); *Falbo* v. *United States*, 320 U. S. 549 (1943) (Selective Service Act); *Lichter* v. *United States*, 334 U. S. 742 (1948) (excess profits legislation); *Lawton* v. *Steele*, 152 U. S. 133 (1894) (legislative exercise of state police power).*

*Other of the cases cited by petitioner, *e.g.*, *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146 (1919), and *Ruppert* v. *Caffey*, 251 U. S. 264 (1920), are cases in which the Supreme Court referred to the *Pacific Railroad* decision under factual situations far removed from the one now before the Court. Additionally, since it is, and long has been, well established that the exercise of war powers is subject to the just compensation provisions of Fifth Amendment, *Ex parte Milligan*, 71 U. S. 2, 120-21 (1866); *Dow* v. *Johnson*, 100 U. S. 158, 169 (1879); Whiting on War Powers (43d ed. 1871) 24, we find ourselves unable to understand petitioner's reference to *Hirabayashi* v. *United States*, 320 U. S. 81 (1943), and *Korematsu* v. *United States*, 323 U. S. 214 (1944).

But such cases have nothing to do with the obligation imposed upon the Government by reason of its deliberate and intentional acquisition of specific private property; they involve merely individual losses incidentally sustained as a result of legislation of general application, which is predicated upon the very principle for which we here contend, *i.e.*, that sacrifices of property in time of emergency for the public good should be borne by the public generally. Statutes designed to effect such a proportionate distribution of loss are completely consistent with the principle embodied in the Fifth Amendment.

2. The decision below is in accord with non-judicial interpretation of the obligation imposed upon the United States by the Fifth Amendment.

Prior to the Act of March 3, 1863, 12 Stat. 765 (1860-1863), which empowered the Court of Claims to enter an enforceable judgment against the Government, Congress was the only forum in which a claimant might obtain relief for property taken by the Government. Many of the claims presented to that body involved a denial taking by American military forces of non-enemy property located in American territory, and we will note but a few of the private acts under which the obligation to compensate under such circumstances was recognized and discharged.

Jacob Shinnick and others owned certain rope-walks in Baltimore during the War of 1812. The property was destroyed by the Army in order to prevent its falling into enemy hands. On February 27, 1815, Congress passed an Act to compensate Shinnick and his associates for the losses they had sustained. 6 Stat. 150 (1790-1845).

William H. Washington was the owner of a house in which the Army had placed miltary provisions. Later, in order to prevent those provisions from falling into enemy hands, the house and all that was in it was destroyed. On March 1, 1815, Congress passed an Act to compensate Washington for his losses. 6 Stat. 151 (1790-1845). The similarity between the destruction of Washington's house to deny to the British the provisions located therein and the destruction of respondents' terminal facilities to deny to the Japanese the stocks of petroleum products there stored (and for which respondents have been fully paid) is obvious.

For other acts providing without reservation full compensation for denial takings, see 6 Stat. 152, 153, 155, 186, 188, 194, 195 (1790-1845).

Josiah O. Armes was the owner of a house in Fairfax County, Virginia, during the War between the States.* Armes was loyal to the Union cause, and Fairfax County was in a part of Virginia not declared in rebellion. The house was destroyed to prevent its falling into Confederate hands. On January 31, 1867, Congress passed an Act to compensate Armes for the property so taken and destroyed. 14 Stat. 617 (1866-1867).

William B. Campbell was the owner of a steamboat located at Caledonia, Illinois, during the War between the States. Campbell was loyal to the Union cause, and Illinois was a State not declared in rebellion. The steamboat was seized to prevent its falling into Confederate hands and was subsequently lost in consequence of that seizure. On June

*It will be remembered that after July 4, 1864, the Court of Claims was without jurisdiction to consider claims arising out of the War between the States, Congress being the only forum to which such a claimant could turn for relief (see *supra* at pp. 24-26).

23, 1870, Congress passed a Joint Resolution conferring upon the Court of Claims jurisdiction to hear and determine Campbell's claim for compensation. 16 Stat. 66 (1869-1871). The Court of Claims ultimately compensated Campbell for his losses. *Campbell* v. *United States*, 8 Ct. Cl. 240 (1872).

A number of buildings which were a part of the University of Kentucky, located at Lexington, Kentucky, in a section of that State not declared to be in rebellion, were taken by military authority and used as a general hospital for Union soldiers. By accident several of the buildings were destroyed. On January 17, 1871, Congress passed an Act, approved by President Grant, to compensate the University for the property so taken and destroyed. 16 Stat. 76 (1869-1871). We might observe here that if a destruction by accident is compensable, *a fortiori* a destruction by design is compensable. See also Act of March 3, 1879, 20 Stat. 134 (1877-1879); Act of March 1, 1881, 21 Stat. 89 (1879-1881); Act of May 1, 1882, 22 Stat. 13 (1881-1882); Act of July 5, 1884, 23 Stat. 28 (1883-1885).

Petitioner concedes (Br., p. 40) that after the War of 1812 and the War between the States the Congress recognized its obligation under the Fifth Amendment to compensate for property destroyed to deny its use to the enemy. It points out, however, that at least the Lawrence Report (see *infra* at p. 54) indicates that some members of the Congress were opposed to making such payments. It also refers to certain claims (Br., p. 40) which, it asserts, were denied because they alleged a denial taking, *e.g.*, American State Papers, Class IX, Claims, Nos. 243, 536 and 587.

The first such claim, while involving property destroyed to deny its use to the enemy, was rejected on the narrow ground that the claimant (a trader) had voluntarily (and for purposes of speculation) brought his property into the area of immediate danger. It was on that ground alone that compensation was denied. The other two claims involved property incidentally destroyed during the War of 1812 when a levee was cut to prevent British troops from bringing up their cannon. Compensation was also denied by the Congress, but the reason therefor is fully consistent with established principles of international law. There the act of destruction was not deliberate or intentional but, rather, completely incidental to the objective sought to be gained. Such losses were properly considered as damage incident to battle, for which compensation has never been given even under the Fifth Amendment. See *Omnia* v. *United States,* 261 U. S. 502, 510 (1923); *Perrin* v. *United States,* 4 Ct. Cl. 543 (1868), *aff'd,* 12 Wall. 315 (U. S. 1870).

Petitioner also argues (Br., p. 41) that the Congress did not provide generally for the payment of claims involving a denial taking, yet it points out (Br., p. 42 n. 12) that the claim of William H. Washington, 6 Stat. 151, which clearly involved a denial taking (*supra* at p. 37) was a case "which came within the policy adopted in Section 9 of the Act of April 9, 1816" (an Act providing compensation for property taken by public authority and destroyed, lost or consumed by the Army during the War of 1812). Thus petitioner urges at once that there was no general enactment covering denial takings and that a congressional enactment "providing generally for the payment of other categories of war losses" (Br., p. 41) specifically

embraced a claim for a destruction of property to deny its use to the enemy.*

In a further attempt to support its contention that the Congress, in years immediately following the War between the States, did not recognize the constitutional obligation to compensate for property taken to deny its use to the enemy, petitioner refers to a number of bills presented for the relief of certain loyal citizens** whose property had been so taken and destroyed. What petitioner fails to recognize, however, is that each of those bills was *passed* by the Congress, only to be vetoed by President Grant on the basis of his own thoughts as to compensability of such claims under the Fifth Amendment. The views of Congress were most adequately expressed by Senator Edmunds, who spoke vigorously *against* the passage of the bill introduced for the relief of J. Milton Best (his opposition being based upon the understanding that the particular facts of the claim presented a question of battle damage rather than denial taking). Thus, during the course of the debate on the bill, he argued as follows (Cong. Globe, 41st Cong., 3d Sess. at 312-13):

> "Now, I undertake to say that not one of the instances referred to by my honorable friend yesterday, of the acts passed after the War of 1812, have the remotest application to a case of this character.

---

*Petitioner also refers to the Act of March 3, 1817, providing compensation for houses destroyed by the enemy and points out that such legislation was enacted "as a law originating in its benignity, and aimed gratuitously for the benefit of any suffering portions of the community" (Br., p. 42 n. 12). We do not, of course, contend that compensation for property destroyed *by the enemy* is given other than as a matter of grace.

**J. Milton Best, East Tennessee University, Manchester Salt Works (Br., pp. 43-50).

> They all of them stand upon the principle I have described, that where private property has been taken and occupied by our troops as military storehouses, as places of deposit for public material, as military workshops, as barracks, and in consequence of that occupation the fire of the enemy has been drawn upon them, or *we have been obliged to destroy them in order to prevent their falling into the hands of the enemy, then, upon the principles of public law that have existed for five hundred years, we have made compensation;* but when as an incident of and as an act of war the property of a citizen is destroyed in consequence of a battle going on, whether by the guns of the one side or the other, he has no claim at all . . ." [Emphasis supplied]

It is obvious from a reading of the Grant veto either that he shared the view of Senator Edmunds as to the facts of the case, *i.e.*, incidental damage rather than a denial taking, or that he was swayed by considerations which have no application at all in determining the constitutional question presented.*

As to the taking of property in connection with World War II, the view of the Congress concerning the obligation

---

*Apparently President Grant himself entertained great doubt as to the correctness of his veto of bills granting compensation for denial takings. Thus in his message accompanying rejection of the Manchester Salt Works measure, he expressly stated (Sen. Ex. Doc. No. 42, 42d Cong., 3d Sess. at p. 2):

> "I am greatly apprehensive that the allowance of this claim could and would be construed into the recognition of a principle binding the United States to pay for *all property* which their military forces destroyed in the late war for the Union. . . ."

His apprehension was, of course, unfounded in constitutional obligation, although it obviously was an important, if not the underlying, reason behind his several vetoes.

of the United States under the Fifth Amendment to pay just compensation for private property taken for military purposes is expressed in the Act of October 16, 1941 (the Requisition of Military Materials Act, 50 U. S. C. App. §§ 721-24), which provides:

> "Whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1946, determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act and the fair value of any property returned under section 2 of this Act, but each such determination shall be made as of the time it is requisitioned or returned, as the case may be, in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States . . . "

3. The principles of constitutional law applied by the court below are consistent with established principles of international law.

Although petitioner discusses at some length (Br., pp. 54-60) the writings of various international law authorities and the decisions of mixed claims commissions, it again fails to recognize that the statements to which it points are in no way related to, or limited by, a principle for the protection of the individual such as is established in the Fifth Amendment to our Constitution. See, *e.g.*, Wolff, *The Science and Method of War;* Borchard, *Diplomatic Protection of Citizens Abroad**; Wormser, *Collection of International War Damage Claims.* Moreover, Wolff merely affirms the lawfulness of a taking to deny useful war material to the enemy. He nowhere suggests that the consequences of such a taking are to be borne alone by the person whose property is taken. And Wormser says only that "for injuries which are *merely incidental* to proper military acts, there is no relief" (p. 157). We do not, of course, argue to the contrary. On the other hand, the statements

---

*We still do not understand petitioner's reliance upon the Borchard work. That author states, after referring with approval to the *Mitchell, Russell, Grant* and *Wiggins* cases (pp. 262-64):

> "A long line of decisions has established the principle that the appropriation of private property for military purposes involves the responsibility of the state. That such a use justifies the taking is unanimously admitted. . . . It is the seizure of private property for the public use and its loss and destruction while so employed that warrants an indemnity to the owner."

Nor can we agree with petitioner's statement (Br., p. 33 n. 20) that the Taylor work [*International Public Law* (1901)] is contrary to our position. When the author states (p. 556) that "private property may be appropriated for public use, or, what is the same thing, destroyed to prevent its falling into the enemy's hands for his use", we believe there is a clear recognition of the obligation to compensate.

found in Whiting, *War Powers under the Constitution* (43d ed. 1871), and II Halleck, *International Law* (4th ed. 1908), were written against the background of our own Constitution. Thus, Hon. William Whiting, Solicitor of the War Department during the period of the War between the States, wrote as follows (pp. 17-18):

> "Public use does not require that the property taken shall be actually *used*. It may be *disused, removed,* or *destroyed*. And destruction of private property may be the best public use it can be put to.
>
> "Suppose a bridge, owned by a private corporation, to be so located as to endanger our forts upon the banks of a river. To demolish that bridge for military purposes, would be to appropriate it to public use. To raze private buildings in a city, for the purpose of preventing a general conflagration, would be to apply them to public use. To destroy arms, or other munitions of war, belonging to private persons, in order to prevent their falling into possession of the enemy, would be to devote them to public use. . . ."

And General Halleck (then Commander-in-Chief of the Armies of the United States) stated (pp. 70-71):

> ". . . Distinction . . . should always be made in regard to the character of the people in the district of country which is militarily occupied or passed over. The people of the country in which you are likely to operate may be divided into three classes:
>
> "First. The truly loyal, who neither aid nor assist the rebels, except under compulsion, but who favor or assist the Union forces. Where it can possibly be avoided, this class of persons should not be subjected to military requisitions, but should receive the protection of our Armies. It may, however, sometimes be necessary to take

> their property, either for our own use or to prevent its falling into the hands of the enemy. They will be paid at the time the value of such property; or, if that be impractical, they will hereafter be fully indemnified. Receipts should be given for all property so taken without being paid for. . . ."*

Decisions of mixed claims commissions (Pet. Br., pp. 57-60) are likewise not determinative of the constitutional obligation to compensate for a denial taking. It is, however, not without importance that such decisions have upheld claims for losses of that nature. See, *e.g., MacDonald (Gt. Br.)* v. *United States,* Mixed Commission of British-American Claims, May 8, 1871, U. S. For. Rel. 1873, Vol. III 54-55 (involving the destruction of non-enemy property located within the Union lines); *Barrington (U. S.)* v. *Mexico,* Commission under the Convention of July 4, 1868, V Moore's Internat. Arb. at 3674; *Labrot (Fr.)* v. *United States,* Commission under the Convention of January 15, 1880, *id.* at 3706; *cf.* the arguments for the United States in *Jardel (Fr.)* v. *United States, id.* at 3700.

In a final attempt to controvert the proposition that in this country the compensability of a denial taking has been consistently recognized, petitioner refers (Br., pp. 60-62) to the action of our State Department taken in 1926 on behalf of the Standard Oil Company of New Jersey in its claim against the British Government for the destruction of its Roumanian oil properties by British military forces to deny their use to the Germans. The British Secretary of State for Foreign Affairs had consistently denied liability

*We have noted petitioner's references (Br., pp. 55-56 n. 23) to other parts of the Halleck work and have found nothing therein at all applicable to the instant controversy.

on the part of his Government, on the ground that the destruction was a "war loss" for the compensability of which not any legal right existed.* That contention was considered at length and rejected by the then Solicitor of the State Department, Dr. Charles Cheney Hyde, U. S. For. Rel., 1926, Vol. II at 316-22; 1924 Opinions of the Solicitor of the Department of State at 438-44; and as a result of his advices a communication prepared by Secretary of State Kellogg was dispatched to the British Foreign Office by the United States Ambassador to the Court of St. James, expressing in vigorous language the position of the Government of the United States on the compensability of a denial taking. Thus, Secretary Kellogg wrote (U. S. For. Rel., 1926, Vol. II at 327-28):

> "In disclaiming liability to indemnify the Standard Oil Company for losses sustained under the circumstances of this case Your Excellency states:
>
> > "'The principle that "war losses" do not give rise to a legal right to compensation is not limited to war losses in the sense of loss or damage inflicted by the enemy, but covers also loss and damage which the commander in the field is himself obliged to inflict upon the owners of property in the area under his authority.'

*Petitioner's statement (Br., p. 60)—that the "significant" point of the treatment of the Standard Oil Company Roumanian loss is the assertion of the British Government that there was no right to compensation—is somewhat difficult to understand in view of the fact that the present claims arise under the Constitution of the United States. Furthermore, whether the Appendix attached to petitioner's brief accurately reflects the present position of the British Government is questionable, inasmuch as a substantial award in favor of Standard-Vacuum for an installation in Singapore, destroyed by the British Navy in 1942 to prevent its falling into the hands of the Japanese, has been made by the British authorities as recently as 1951.

"...

"The Government of the United States does not assert that a belligerent is liable to indemnify property owners for property which may be destroyed by its acts of war as that term is used to indicate acts for which no liability attaches. My Government has not admitted, as Your Excellency seems to think it has done, that the destruction of the property of Romano-Americana was an act of war as so understood. It is the view of the Government of the United States, which it is prepared to sustain with respectable authorities, some of which His Majesty's Government have had occasion to employ in support of claims of its nationals, that under some circumstances a belligerent is obligated to indemnify owners of property which it takes or destroys. The occasions on which private property may be taken and destroyed with or without compensation are authoritatively defined with clarity. *The taking of property by a belligerent to prevent its falling into the hands of an enemy comes within the category of cases in which a belligerent is obligated to indemnify the owner.*" [Emphasis supplied]

Secretary Kellogg then referred to many of the numerous authorities directly supporting the view of his Government that a denial taking is compensable and concluded as follows (pp. 332-35):

"It will be perceived from the foregoing discussion that according to the most eminent authorities on international law, by decisions of courts of the United States which His Majesty's Government has seen fit to endorse and employ in supporting claims of its nationals, and by at least one decision of the Commission established pursuant to the Treaty of May 8, 1871, between the United States and Her Majesty's

Government, *the liability of a government to indemnify owners of property destroyed to prevent its falling into the hands of the enemy is established.* There seems to be no occasion to doubt that the claim of the Standard Oil Company falls within the declarations in decisions cited.

"*My Government feels that the facts of the present case are so clear and the applicable principles of law so elementary that there is occasion only for discussion of the amount of indemnity to be paid.** My Government hopes that Your Excellency's Government will see its way to authorize a representative to meet a representative of the Government of the United States for the purpose of discussing the amount of indemnity to be paid. Should Your Excellency's Government be unwilling to participate in such a discussion, my Government feels that it is under the necessity of insisting that the question of the liability of His Majesty's Government in the premises and, if liable, the question of the amount of indemnity to be paid be submitted to arbitration pursuant to the Agreement of April 4, 1908 between the Government of the United States and His Majesty's Government, which was extended by the Agreement between the two Governments concluded June 3 [23], 1923.

"I am instructed to add in conclusion that it would be a source of keen regret to my Government were his Majesty's Government to decline to adjust this claim or to submit the question of liability and the

---

*This view was reaffirmed by the Department of State in a letter dated May 22, 1929, from the United States to the League of Nations Preparatory Committee of the Conference for the Codification of International Law. See *Bases of Discussion*, Vol. III, Supp. (League of Nations Pub. 1929, V. 10) 20, 22; V. Hackworth, *Digest of International Law* (1943) at 705-06.

amount of damages to arbitration." [Emphasis supplied]

4. Petitioner's arguments addressed to the expediency of compliance with its constitutional obligation do not afford any basis for challenging the correctness of the decision below.

As the court below recognized (R. 47), the fundamental issue in these cases is to be determined solely with reference to the "just compensation" provisions of the Fifth Amendment to the Constitution of the United States. Either there was a taking of respondents' properties for public use within the meaning of that Amendment, or there was not such a taking. No other issue is presented.

The court below has held that factually the cases fall within the scope of the constitutional provision. That conclusion, if upheld, makes the Government liable under the Constitution for the payment of just compensation, and arguments addressed to the "wisdom" and "inadvisability" of imposing such liability are wholly irrelevant (Br., pp. 12, 63). Once it has been determined that the constitutional guarantee of compensation is applicable, *i.e.*, that there has in fact been a "taking", the question of liability becomes fixed. Petitioner has, however, failed fully to recognize the distinction between a claim under the Constitution and one to which constitutional limitations are inapplicable and has fashioned a number of arguments which invite consideration of principles having no place at all in a proper determination of the *constitutional* question here presented. For that reason we propose to deal individually with those arguments as a means of bringing into focus with finality the precise nature of the instant controversy.

(a) *A denial taking, unlike battle damage, involves a deliberate and intentional act calculated to benefit the public generally at the expense only of the person whose property is taken.*

As an opening wedge in its attack on the judgment below, petitioner argues (Br., p. 12) that it is "neither practical nor equitable to attach to [a denial taking] a rigid right to full compensation which concededly does not exist with respect to battle damage." In other words, it argues that a denial taking, being identifiable with battle damage because both involve loss of property, must be non-compensable because battle damage is non-compensable. The difficulty with that argument is, simply, that it loses sight of the very obvious difference between battle damage and denial damage—a difference that is fundamental in this case.

Property located in the general area of military operations may, as an incident of those operations, be damaged or destroyed by our own forces (perhaps by artillery fire or air attack). Damage of that character, because of its incidental nature, has been generally referred to as battle damage. Clearly there is no implied contract under the Fifth Amendment to compensate for the losses so sustained, and the Government has never recognized a liability in tort for any such incidental damage. On the other hand, military operations sometimes require that specific property, because of its potential use to the enemy, be destroyed as a means of furthering the cause of our own forces. Destruction under those circumstances is necessarily the result of an intentional and deliberate act—an act of selection from which a contract to compensate can readily be implied. The prop-

erty has been put to a public use and, for that reason, falls squarely within the constitutional provision requiring the payment of just compensation. Damage of that sort is as different from battle damage as the principle of eminent domain is different from the law of overruling necessity. The one is limited by the Constitution; the other is limited only by the nature of the emergency to be met.

In the instant cases we are dealing with just such a deliberate and intentional act of taking. And what petitioner characterizes as a "rigid right to full compensation" (Br., p. 12) is no more than what the Fifth Amendment guarantees. The Government chose to exercise its power of eminent domain by selecting respondents' properties for public use. Having done so, its obligation to give just compensation is clear.

(b) *Liability under the Fifth Amendment is to be determined in the light of what the Government actually did—not what it might have done.*

Petitioner also suggests boldly (Br., p. 14) that the instruction of the Fifth Amendment can be disregarded when its application would bring about an "unrealistic" result. Thus it states that the Army might have destroyed respondents' properties if in enemy hands without liability under the Constitution, from which it reasons that the Army with equal freedom from liability could have destroyed the properties before enemy occupation. Here again petitioner loses sight of the constitutional provision. Although the power of eminent domain is an attribute to sovereignty, it is expressly limited by the Fifth Amendment. To say that the Government possesses the power to take and destroy

specific property and then to deny compensation because of what might have happened had it not so acted is blindly to disregard what the framers of our Constitution viewed as a necessary restraint upon sovereign use of private property.

We do not, of course, deny that the Army could have allowed respondents' properties to fall into the hands of the enemy and then destroyed them (possibly at great expense and loss of life*). The fact is, however, as the record so clearly shows, that representatives of the Government entrusted with the decision chose deliberately to destroy the properties. The question of what might have happened is not, therefore, before this Court.

We have earlier dealt with the decisions of this Court and of the court below upholding the compensability under the Fifth Amendment of the losses sustained by these respondents (see *supra* at pp. 15-29). We will add here, however, that an argument similar to the one now made by petitioner was advanced in *Grant* v. *United States*, 1 Ct. Cl. 41 (1863), which provoked the court to say (p. 50):

> ". . . that the same loss would have befallen him [the claimant] in another way is an illiberal, and, we think, illegal response to the claim for compensation."

Obviously, in arguing that respondents are not entitled to compensation because of what might have happened, petitioner is indulging in hindsight to escape its clear obligation under the Fifth Amendment.

---

*Compare the statement (Pet. Br., pp. 14-15 n. 5a) that during World War II the total cost of depriving the Axis powers of the use of the Ploesti facilities included the loss of 350 heavy bombers.

(c) *That the property might have been destroyed by the enemy is no answer to a claim for just compensation for property actually taken for public use.*

Petitioner does not deny that respondents' oil terminals were singled out for destruction because of their potential use to the enemy. Moreover, for all stocks of petroleum products stored in the terminals at the time of demolition petitioner has paid respondents in full. Petitioner argues (Br., pp. 13-14), however, that because the enemy might have destroyed the properties, they were without value either to our armed forces or to respondents and that, for that reason, compensation should not be payable under the Fifth Amendment. The fallacies in that argument are threefold.

First, the record in these cases is barren of testimony even indirectly supporting petitioner's contention that the properties, for the loss of which claim is here made, would have been destroyed by the enemy. Quite to the contrary, the Japanese were obviously interested not only in the supplies of petroleum products which might remain in the terminals upon their occupation of Manila, but also in the installations as a means of storing petroleum obtained from the producing fields of the East Indies. There is no reason at all to believe that they would have destroyed the terminal facilities. In any event what the Japanese might have done is sheer speculation and completely without meaning beside the fact that the Army chose deliberately to destroy the terminals. *Cf. United States* v. *Causby*, 328 U. S. 256, 268 (1946).

Secondly, the value of the properties at the time of demolition is a question not now before this Court for decision,

that question having been specifically reserved for future proceedings in the Court of Claims (R. 61).

Thirdly, and most importantly, when private property is taken for a public use, the Constitution requires the payment of just compensation. Perhaps the value of the property would have been "hopelessly speculative" (Br., p. 16) had it been left to the use of the enemy. But that question is not reached when the Army deliberately chose to put the properties to its own use—by destroying them to insure that they could not be used by the enemy. Moreover, to argue that the properties were not put to a "beneficial use" (Br., p. 14) is to disregard the realities of the situation. If the destruction were of no use to the Army, necessarily it would not have been accomplished. It follows, therefore, that the property was taken and used, and that the clear and unequivocal constitutional provision for just compensation must be applied.*

(d) *The just compensation provisions of the Fifth Amendment are not circumscribed by considerations of potential liability; if property is taken, compensation is payable.*

Petitioner concedes (Br., p. 18) that only a relatively small amount of non-enemy property was destroyed in non-

*Throughout its brief (*e.g.*, pp. 16, 17, 40), petitioner has presented arguments identical with those set forth at considerable length in the so-called Lawrence report. That report was prepared by a member of the Senate War Claims Committee at a time when Congress had undertaken the responsibility of determining which of the claims arising out of the War between the States were to be paid. The legislative history of that report does not indicate that it ever received the approval of the Senate. Indeed, as petitioner must agree, the views of the Senate at that time were diametrically opposed to the views set forth in the report. See, *e.g.*, the bills for the relief of Best, East Tennessee University, Manchester Salt Works, etc., all of which were passed not only by the Senate but by the House.

enemy territory during World War II to deny its use to the enemy. Indeed, we know of no other claim which has been brought to recover for losses of such a nature. Yet petitioner argues (Br., pp. 17-18) that the obligation of the Fifth Amendment should not attach here simply because at some future time the Government may be faced with "impossible financial burdens" stemming from extensive takings of a denial nature. But again there is a short answer to the argument.

When private property is taken for a public use, the right to compensation clearly follows from the Fifth Amendment. And where, as here, specific property has been deemed so essential to the war effort that it has been taken and used for the good of the nation, it is as much a violation of the Constitution to require the owner of that property to bear the loss alone as it is to direct a tax at the property of but a single person. The burden of the common defense is not to be disproportionately distributed, and a system of uniform taxation has been authorized to ensure that end. In the same way the Fifth Amendment ensures compensation for a taking of private property for a public use. The *obligation* to pay under such circumstances is absolute, and nowhere is it limited by considerations of *ability* to pay. The greater the value of the property taken for the good of the nation, the more compelling is the requirement of the Fifth Amendment that the public generally bear the cost of acquisition.

(c) *The Fifth Amendment is not limited by speculation as to the over-all reconstruction needs of modern warfare.*

While purporting "to regret the losses incurred by the respondents through no fault of their own" (Br., p. 18),

petitioner presents the two-fold argument (a) that problems of reconstruction, as resolved in the Philippine Rehabilitation Act [60 Stat. 138 (1946)], can negative an expressed constitutional provision and (b) that the Philippine Rehabilitation Act itself contemplates the compensability of a denial taking only as a matter of grace. Those contentions can be disposed of briefly.

Whatever might be the reconstruction problems following upon hostile military operations on American soil, those problems necessarily remain within the province of the legislative branch of the Government. We are not aware of any restraint at all upon the freedom of action possessed by that body to deal in its discretion with questions of compensation to be allowed for battle damage.* On the other hand, where there has been a taking of private property for public use, the Congress, just as the judiciary, is bound by constitutional limitation and is, accordingly, obliged to give just compensation whenever guaranteed by the Fifth Amendment. If, in the light of the possible economic effects of a World War III fought within the territorial limits of this country, that guaranty is no longer tolerable, any change therein must come in the form of a new constitutional amendment, not through the emasculation of the present one by strained judicial interpretation.

Petitioner's argument based on the Philippine Rehabilitation Act breaks down as follows:

---

*The British Parliament during the last war resolved its reconstruction problems before they became acute through the simple medium of compulsory war damage insurance (see, *e. g.*, War Damage Act, 1943, 6 & 7 Geo. 6, c. 21, 26 Halsbury's Statutes of England 468 *et seq.*, consolidating earlier war-damage enactments). That statute covered damage which, in this country, would be compensable under the Fifth Amendment; but the underlying principle—that of equal distribution of the loss—is the same. *Cf.* Pet. Br. Appendix A (pp. 64-65).

(a) the Act broadly provides for compensation for war losses, without regard to whether or not the circumstances of loss fall within any recognized principle of legal liability;

(b) certain of the losses covered in the Act might not otherwise have been legally compensable, *e.g.*, losses incurred by reason of enemy attack, looting, pillage, etc., compensation being allowed "as a matter of grace";

(c) therefore, since a denial taking is compensable under the Act, it is compensable "as a matter of grace".

The reasoning employed by petitioner simply does not follow. Moreover, while the respondents Standard-Vacuum and Caltex* might have obtained under the Act partial compensation in local currency for their war losses in the Philippines, the Act was never intended to limit in any way the legal liability of the United States for claims compensable without regard to its specific provisions or to require acceptance by a claimant of its limited benefits in lieu of the complete relief to which such a claimant would otherwise be entitled.

We believe that the foregoing discussion adequately points up petitioner's misconception of the fundamental issue in these cases. The Court is not here concerned with what might have been the consequences of Army action short of an actual taking and use of respondents' properties. The fact is that the properties were taken and used by

*The respondent Shell Philippines, a British corporation, would not qualify for benefits under the Act. See 50 U. S. C. App. § 1752 (1948). In the light of the above discussion, we fail to see how such "underscores the fact that compensation was not provided in discharge of any constitutional obligation" (Pet. Br., p. 52 n. 19).

the Army, for which the Government is bound under the Fifth Amendment to the payment of just compensation.

CONCLUSION

The judgment below, holding that respondents are entitled under the Fifth Amendment to recover for the taking of their terminal facilities at Pandacan, is right and should be affirmed.

Respectfully submitted,

LEO T. KISSAM,
Counsel for Respondent
Caltex (Philippines), Inc.,
20 Pine Street,
New York 5, N. Y.

ALBERT R. CONNELLY,
Counsel for Respondents
The Shell Company of
Philippine Islands Limited
and Standard-Vacuum Oil
Company,
15 Broad Street,
New York 5, N. Y.

October 13, 1952.

PETITION FOR REHEARING

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 23 1952

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 16

THE UNITED STATES,
Petitioner,

v.

CALTEX (PHILIPPINES), INC., THE SHELL COMPANY OF PHILIPPINE ISLANDS LIMITED and STANDARD-VACUUM OIL COMPANY,
Respondents.

PETITION FOR REHEARING

LEO T. KISSAM,
Counsel for Respondent Caltex (Philippines), Inc.,
20 Pine Street,
New York 5, N. Y.

ALBERT R. CONNELLY,
Counsel for Respondents The Shell Company of Philippine Islands Limited and Standard-Vacuum Oil Company,
15 Broad Street,
New York 5, N. Y.

December 23, 1952.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

THE UNITED STATES, *Petitioner,* v. CALTEX (PHILIPPINES), INC., THE SHELL COMPANY OF PHILIPPINE ISLANDS LIMITED and STANDARD-VACUUM OIL COMPANY, *Respondents.*	No. 16

PETITION FOR REHEARING

Now come the above-named respondents and present this, their petition for a rehearing of the above-entitled cause, and in support thereof respectfully state the following as grounds therefor.

In its decision of December 8, 1952, a majority of this Court decided that a wartime destruction of private property to prevent its falling into the hands of the enemy does not, in and of itself, constitute a compensable taking of private property within the meaning of the Fifth Amendment. In so deciding, this Court rejected the principle announced in *Mitchell* v. *Harmony*, 13 How. 115 (U. S. 1852), and *United States* v. *Russell*, 13 Wall. 623 (U. S. 1871); and rested its decision upon one of two conflicting *dicta* in *United States* v. *Pacific Railroad Co.*, 120 U. S. 227 (1887).*

---

* In the *Pacific Railroad* case, Mr. Justice Field also recognized, in his paraphrase of Vattel's Law of Nations, the principle that

> ". . . those [damages] done by the state deliberately and by way of precaution, as when a field, a house or a garden, belong-

We assume that the Court gave full consideration to the arguments in favor of adhering to the previously-established rule, and we shall not, therefore, urge reargument of the principle, as an abstract proposition, announced by the Court in the instant case.* In applying that principle to the facts of the present case, however, it is submitted that the Court has overlooked controlling findings of the Court of Claims which require an affirmance of the judgment of that Court.

---

ing to a private person, is taken for the purpose of erecting on the spot a town rampart or other piece of fortification; or when his standing corn or his storehouses are destroyed to prevent their being of use to the enemy; and stating that such damages are to be made good to the individual, who should bear only his quota of the loss . . ." [120 U. S. at 234].

*The Court may, however, wish to correct its opinion in at least two respects:

(1) It is respectfully submitted that the Court erred in stating that "what was said in the *Pacific Railroad* case was later made the basis for the holding in *Juragua Iron Co.* v. *United States*, 212 U. S. 297 (1909)". The Court's attention is invited to the language appearing in 212 U. S. at 305-06, 308 (quoted in respondents' brief at p. 34), from which it is clear that the *Juragua* decision rests upon the fundamental proposition that property destroyed in enemy territory is considered enemy property, for the destruction of which the Government is not liable under the Fifth Amendment.

(2) It is also submitted that the Court erred in stating that "the common law had long recognized that in times of imminent peril—such as when fire threatened a whole community—the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved". The *dicta* in the cases cited for that proposition [*Bowditch* v. *Boston*, 101 U. S. 16, 18-19 (1879); *Respublica* v. *Sparhawk*, 1 Dall. 383 (Pa. 1788); *Parham* v. *The Justices*, 9 Ga. 341, 348-49 (1850)] considered only the common law principle that an *individual* was not liable for property destroyed for the public good under circumstances of overruling necessity. Such cases did not purport to limit in any respect the obligation of the State to pay just compensation for property which it has taken and used and itself destroyed in the exercise of its power of eminent domain.

I

The decision of this Court fails to give proper effect to the findings of the Court of Claims that on December 12, 1941, the United States Army took exclusive control of respondents' properties and that it used them continuously thereafter through December 26, 1941.

The Court of Claims, after having first found (FF 1-2, 4-5, R. 30-31) that years before the outbreak of war the Army had formulated written war plans looking toward seizure of respondents' properties in the event of an emergency, then went on specifically to find (FF 29, R. 41) that

> "On December 12, 1941, [after the outbreak of war] the United States Army took control of the operation of supply and distribution of petroleum products from the stocks on hand of the oil companies at their Pandacan terminals to the troops in the field. In the exercise of this control the Army used the land, buildings, fixed installations, equipment, containers, rolling stock, and personnel of the oil companies' Pandacan terminals. Such use was continued through December 26, 1941. . . ."

It is submitted that this Court has wholly misconceived the significance of that finding in stating, in its opinion, "While the military exercised considerable control over the business operations of respondents' terminals during the period between December 12 and December 26, there was not, according to the findings below, an assumption of actual physical or proprietary dominion over them during this period." The Court of Claims did not find that the Army

"exercised considerable control over the business operations of respondents' terminals" during that period. It found that the Army "took control of the operation" and that the Army —not the respondents—"used the land, buildings, fixed installations, equipment, containers, rolling stock and personnel . . . through December 26, 1941." It is true that the court below did not find that there had been a taking of *ownership* of respondents' facilities prior to December 27. It did find, however, that there had been a taking of the "use" of such facilities, which was clearly a compensable taking if respondents had asserted the claim for compensation for that use. The situation thus created was precisely the same as if the United States had requisitioned the use of privately-owned motor cars, expecting to return them at a later date.

Where property subsequently destroyed has been continuously used and exclusively controlled by the Government, an implied agreement under the Fifth Amendment to pay for that use and for the destruction effected during the course thereof may properly be found. So much was expressly decided in the *Pewee Coal* and *General Motors* cases,* and it is the existence here of such prior use and control, coupled with the fact of formal requisition, that makes inapplicable the *dictum* in *Pacific Railroad* principally relied on by the Court in reversing the judgment below.

United States v. *Pewee Coal Company*, 341 U. S. 114 (1951); *United States* v. *General Motors Corp.*, 323 U. S. 373 (1945).

II

The finding below of a requisition on December 27, 1941, binding in this Court, requires affirmance of the judgment under review.

The Court of Claims found (FF 30, R. 41-42) that

> "On December 27, 1941, the United States Army requisitioned all remaining petroleum stocks, and all storage and handling facilities at the Pandacan terminals of the oil companies. The requisition was in anticipation and for the purpose of destruction to prevent items of military value from falling into the hands of the enemy."

Although the requisition there found is nowhere so qualified by the Court of Claims, this Court has characterized it as "no more than an order to evacuate the premises which were slated for demolition."

The above-quoted finding of the Court of Claims is founded upon a formal letter of requisition (II R. 293) which is unambiguous in its terms. It states:

> "Effective immediately all petroleum stocks, storage and handling facilities, etc., at your Manila, Pandacan oil depots are requisitioned by the U. S. Army . . ."

It is difficult to conceive of a more formal and manifestly intentional taking of respondents' properties. Indeed, in the case of Caltex, in addition to the formal letter of requisition, a written receipt was given for all terminal facilities and stocks requisitioned. It is one thing to hold that mere incidental destruction of property to prevent its

falling into enemy hands is non-compensable and quite a different thing to hold that one whose property has been formally requisitioned and later destroyed to prevent it from falling into enemy hands is not entitled to compensation.

Compensation has been denied to respondents herein, notwithstanding the fact that their properties were concededly requisitioned for a public purpose, apparently because the public use to which the Government put their property was to destroy it. If this be a valid ground for removing the protection of the Fifth Amendment, the same conclusion would logically have to be reached in cases where the Government in the exercise of its right of eminent domain takes property of a citizen and destroys it to build a highway. But it is clear that such a taking for purposes of destruction is compensable [*United States* v. *Causby*, 328 U. S. 256 (1946)]. We respectfully submit that there is no reason why the constitutional protection should be clearly applicable in the one situation and yet refused application in the other.

CONCLUSION

For the foregoing reasons, and on the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that, upon rehearing, the judgment of the Court of Claims be affirmed.

Respectfully submitted,

LEO T. KISSAM,
Counsel for Respondent Caltex (Philippines), Inc.,
20 Pine Street,
New York 5, N. Y.

ALBERT R. CONNELLY,
Counsel for Respondents The Shell Company of Philippine Islands Limited and Standard-Vacuum Oil Company,
15 Broad Street,
New York 5, N. Y.

December 23, 1952.

CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

.....

Leo T. Kissam

.....

Albert R. Connelly